Narrowing the Scope of the Speedy Trial Right: United States v. MacDonald

Paul R. Clevenger

NARROWING THE SCOPE OF THE SPEEDY TRIAL RIGHT: *UNITED STATES V. MACDONALD*

IN February 1970 the wife and two small children of Captain Jeffrey MacDonald, an Army physician, were murdered at Fort Bragg, North Carolina.[1] The Army initially charged MacDonald with the killings, but in October 1970 dropped the charges.[2] At the request of the Justice Department, however, the Army continued its investigation of the crime and compiled a series of reports on the incident during the years 1971-1973.[3] Based on these investigations, the Justice Department decided to prosecute and in January 1975 succeeded in obtaining a grand jury indictment charging MacDonald with murder.[4] Following a jury trial in the United States District Court for the Eastern District of North Carolina, MacDonald was convicted on three counts of murder and sentenced to three consecutive life imprisonment terms. MacDonald then moved to vacate the convictions and dismiss the indictment.[5] He argued that the government's failure to bring him to trial until four and one half years after his initial military arrest constituted a violation of his sixth amendment right to a speedy trial.[6] The district court denied the motion, but the

1. The murders took place in the family's home on the base. When the military police arrived at the scene after receiving a call from MacDonald, they found that the three victims had been stabbed to death and that MacDonald himself had passed out from a knife wound to the chest. MacDonald claimed that the family was attacked by several intruders who knocked him unconscious and murdered his wife and children in a ritualistic manner. Physical evidence at the scene, however, contradicted portions of MacDonald's story, and led Army investigators to suspect that MacDonald himself had committed the crime.

2. In May 1970 the Army formally charged MacDonald with the murders pursuant to art. 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 830 (1976). An Army officer was appointed to investigate the charges as required by art. 32 of the UCMJ. *Id.* § 832. After conducting a thorough investigation, the officer filed a report recommending that the charges against MacDonald be dropped. On review of the report, the commanding officer at Fort Bragg dismissed the charges. Brief for the United States at 4-5. Several months after the dismissal of charges, MacDonald was granted an honorable discharge that barred any further military proceedings against him.

3. Beginning in January 1971 the Army Criminal Investigation Division (CID) launched an intensive investigation of the murders, and in June 1972 the CID submitted a thirteen-volume report to the Justice Department recommending further investigation. At the request of the Justice Department, the CID submitted additional reports in November 1972 and August 1973. Brief for the United States at 5-6.

4. MacDonald was charged with violation of 18 U.S.C. § 1111 (1976). The district court had jurisdiction because the crime was committed on military property. *Id.* § 7(3).

5. In Barker v. Wingo, 407 U.S. 514, 522 (1972), the Supreme Court held that dismissal of charges is the only possible remedy when a speedy trial has been denied.

6. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. Prior to his trial, MacDonald moved to dismiss the indictment on the same speedy trial grounds he had as-

Fourth Circuit reversed on appeal.[7] Finding that MacDonald's right to a speedy trial attached at the time of his military arrest and remained in effect until the civilian trial,[8] the court held that the delay between arrest and trial was unreasonable and violated the sixth amendment.[9] The United States Supreme Court granted certiorari. *Held, reversed and remanded*: The time between dismissal of criminal charges and subsequent indictment on the same charges may not be considered in determining whether a defendant's sixth amendment right to a speedy trial has been violated. *United States v. MacDonald*, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

I. ATTACHMENT AND TERMINATION OF THE SPEEDY TRIAL RIGHT DURING CRIMINAL PROCEEDINGS

The sixth amendment to the Constitution, which guarantees the right to a speedy trial to every criminal defendant,[10] has long been recognized by the courts.[11] When considering whether the right has been violated, a court must initially determine whether a delay in bringing the defendant to trial has been excessive.[12] In order to measure the length of a pretrial

---

serted after his conviction, and the district court denied the motion. The Fourth Circuit reversed, United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976) (*MacDonald I*), but the Supreme Court reversed and remanded on procedural grounds without reaching the merits of the sixth amendment issue. United States v. MacDonald, 435 U.S. 850 (1978).

MacDonald then took another interlocutory appeal, arguing that the institution of civilian proceedings after dismissal of the military charges constituted a violation of his fifth amendment guarantee against double jeopardy. United States v. MacDonald, 585 F.2d 1211 (4th Cir. 1978), *cert. denied*, 440 U.S. 961 (1979). The Fourth Circuit rejected the argument and held that because the military proceedings were investigative only and did not establish MacDonald's guilt or innocence, the fifth amendment guarantee against double jeopardy did not bar subsequent civilian prosecution. 585 F.2d at 1212. For commentary on the application of the double jeopardy clause to the Fourth Circuit's 1978 *MacDonald* opinion, see Schuman, *Did Captain MacDonald Receive a Speedy Trial?*, 54 CONN. B.J. 69, 74-76 (1980).

7. United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980) (*MacDonald II*). For commentary on *MacDonald II*, see Note, *Right to Speedy Trial in Civilian Prosecution Denied by Delay Following Dismissal of Military Charges—United States v. MacDonald*, 17 WAKE FOREST L. REV. 89 (1981).

8. 632 F.2d at 261. In *MacDonald I* the Fourth Circuit stated its reasons for counting the period between dismissal and reindictment for speedy trial purposes. The court held that the dismissal of military charges did not dispel the effects of initial prosecution, because MacDonald remained under suspicion and was subjected to the anxiety of another prosecution. *Id.* at 204.

9. The court found that the delay was sufficiently excessive to trigger the analysis developed by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), for determining speedy trial violations. 632 F.2d at 262. Applying the *Barker* analysis, the court found that MacDonald's right to a speedy trial had been violated because: (1) the government had asserted no adequate explanation for the delay; (2) MacDonald had timely asserted his right; and (3) a substantial possibility existed that MacDonald's defense was prejudiced by the delay. *Id.* at 262-67. For a discussion of the *Barker* test, see *infra* note 12.

10. U.S. CONST. amend. VI. For the text of the sixth amendment, see *supra* note 6. For discussion of the sixth amendment right to a speedy trial, see generally C. WHITEBREAD, CRIMINAL PROCEDURE 474-81 (1980).

11. For an historical discussion of the speedy trial right, see Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967).

12. A finding of excessive delay in bringing a defendant to trial does not in itself estab-

delay, the court must decide at which stage in the prosecution the defendant becomes entitled to a speedy trial.[13] Furthermore, if charges against a defendant have been dismissed and later reinstated, the court must consider the effect of the suspension in the proceedings on the defendant's speedy trial right.[14]

Most lower federal courts have held that the speedy trial right attaches only after prosecution has been formally initiated and not during prearrest investigation.[15] In *United States v. Marion*[16] the Supreme Court followed these lower court holdings. In *Marion* the defendants were indicted on several counts of fraud approximately three years after the completion of the alleged criminal scheme. The government, however, had knowledge of the scheme at the time of its completion. The defendants claimed that the preindictment delay was inherently prejudicial to their ability to prepare an adequate defense and therefore violated their sixth amendment right to a speedy trial. The Supreme Court rejected that argument, holding that the protection of the sixth amendment only becomes available when criminal prosecution has begun and extends only to those persons who are accused during that prosecution.[17] Noting that the purpose of the speedy trial right is to prevent oppressive pretrial incarceration and minimize the anxiety and concern generated by public accusation, the Court stated that the government's act of arrest and detainment triggers the sixth amendment.[18] According to the Court, until arrest or indictment an individual does not suffer any restraints on his lifestyle and is not the subject of public accusation;[19] only formal indictment, information, or the actual restraints imposed by arrest and holding to answer a criminal charge activate the

---

lish a violation of the right to a speedy trial. United States v. Ewell, 383 U.S. 116 (1966). In *Ewell* the Supreme Court held that a defendant's speedy trial right is violated only if he can show that a lengthy delay: (1) prejudiced his ability to defend himself; or (2) resulted in oppressive incarceration. *Id.* at 120-22. For commentary on *Ewell*, see 54 GEO. L.J. 1428 (1966).

In Barker v. Wingo, 407 U.S. 514 (1972), the Court developed a four-part balancing test for determining violations of a speedy trial right. The Court cited the length of the delay as the initial "triggering" factor of the test: if a delay is determined to be excessive, a court must consider: (1) the reason for the delay; (2) whether the defendant timely asserted his right; and (3) whether the defendant was prejudiced by the delay. *Id.* at 530. For commentary on *Barker*, see Uviller, Barker v. Wingo: *Speedy Trial Gets A Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972); Note, *supra* note 7, at 95-102; 26 VAND. L. REV. 171 (1973).

13. For example, see Pitts v. North Carolina, 395 F.2d 182, 185 n.3 (4th Cir. 1968), and Foley v. United States, 290 F.2d 562, 566 (8th Cir. 1961), in which both courts held that the delay must be computed from the time of institution of formal criminal proceedings against the defendant.

14. *See infra* notes 33 & 47 and accompanying text.

15. *See* United States v. Marion, 404 U.S. 307, 315 n.8 (1971), and cases cited therein.

16. 404 U.S. 307 (1971). For commentary on *Marion*, see 3 WHARTON'S CRIMINAL PROCEDURE § 420 (C. Torcia 12th ed. 1975); Comment, *The Speedy Trial Guarantee: Criteria and Confusion In Interpreting Its Violation*, 22 DE PAUL L. REV. 839, 857-64 (1973).

17. 404 U.S. at 313.

18. *Id.* The Court stated that "[a]rrest is a public act that may seriously interfere with the defendant's liberty, . . . and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.*

19. *Id.* at 321.

protection of the sixth amendment.[20]

Although it refused to extend sixth amendment protection to prearrest and preindictment delay, the Court in *Marion* recognized that such delay may create a possibility of prejudice to the defendant at trial.[21] The Court observed, however, that prejudice may result from any delay, and a lengthy period prior to arrest and indictment may weaken the government's case as well.[22] The Court also noted that two safeguards protect against prejudice resulting from delay between the commission of a crime and the arrest or indictment. First, statutes of limitation require the government to begin prosecution within a specific time and thus provide protection against the bringing of stale criminal charges.[23] Secondly, under certain circumstances the due process clause of the fifth amendment[24] may require dismissal of charges if the defendant can show that he was actually prejudiced by a prearrest or preindictment delay.[25]

The Supreme Court again considered the time of attachment of the speedy trial right in *Dillingham v. United States*.[26] In *Dillingham* the defendant was not indicted until twenty-two months after his arrest and was not tried until twelve months after indictment. The Fifth Circuit rejected the defendant's claim that his right to a speedy trial had been violated and held that preindictment delay need not be counted when evaluating a speedy trial claim.[27] In reversing the Fifth Circuit, the Supreme Court reaffirmed its position in *Marion* that the speedy trial right attaches at the time of arrest.[28] The Court, therefore, held that in addition to the post-indictment period, the period between arrest and indictment must be considered for purposes of speedy trial analysis.[29]

Although *Marion* and *Dillingham* firmly established that the right to a

---

20. *Id.* at 320.

21. *Id.* at 321. The Court acknowledged that a lengthy delay may impair a defendant's ability to prepare a defense because memories may fade, evidence may be lost, and witnesses may disappear. *Id.* at 322. For a discussion of the effect of a pretrial delay on the defendant, see generally L. KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 56-59 (1972).

22. 404 U.S. at 322.

23. *Id.*

24. U.S. CONST. amend. V provides that no person shall "be deprived of life, liberty, or property, without due process of law." For background on the relationship between speedy trial analysis and the fifth amendment, see Lite, *The Pre-Accusation Delay Dilemma*, 10 SETON HALL L. REV. 539 (1980).

25. 404 U.S. at 324. The Court refused to decide under what circumstances a showing of actual prejudice would require dismissal pursuant to the due process clause. *Id.* In United States v. Lovasco, 431 U.S. 783 (1977), however, the Court held that proof of actual prejudice to the defendant makes a due process claim ripe for adjudication, but in order to obtain dismissal the defendant must show that the government violated "fundamental conceptions of justice." *Id.* at 789-91. For a discussion of *Lovasco* and the due process clause as applied to prearrest delay, see Note, *supra* note 7, at 104-08.

26. 423 U.S. 64 (1975).

27. United States v. Palmer, 502 F.2d 1233, 1235 (5th Cir. 1974) (citing United States v. Smith, 487 F.2d 175 (5th Cir. 1973), *cert. denied*, 419 U.S. 846 (1974)), *rev'd sub nom.* Dillingham v. United States, 423 U.S. 64 (1975).

28. 423 U.S. at 65.

29. *Id.*

speedy trial attaches at the time of arrest and formal charging, the Supreme Court has never addressed the issue of attachment of the right when prosecutors dismiss charges against a defendant and subsequently indict him on the same charges.[30] The question therefore remains open whether the speedy trial right attaches at the time of original charging and remains effective throughout the period between dismissal and indictment, or whether the right is terminated at dismissal and attaches anew upon reindictment.[31]

Federal courts that have considered the effect of dismissal and reindictment on the right to a speedy trial have split on the issue.[32] A number of circuits have held that the right terminates at dismissal and reattaches upon reindictment, so that the period during which charges are suspended may not be considered when determining the length of delay before trial.[33] Thus, in *United States v. Martin*[34] the Sixth Circuit held that a two-year period between the dismissal of charges and reinstitution of the same charges was irrelevant for speedy trial purposes.[35] The court relied on the

30. The double jeopardy clause of the fifth amendment prohibits multiple prosecutions for the same offense. U.S. CONST. amend. V. Jeopardy attaches in a jury trial when the jury is empanelled and sworn, and in a nonjury trial when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377, 388 (1975). The double jeopardy clause, therefore, is not violated when charges against a defendant are dismissed and he is later reindicted, as long as trial does not begin before dismissal of charges. *See* United States v. MacDonald, 585 F.2d 1211 (4th Cir. 1978), *cert. denied*, 440 U.S. 961 (1979).

31. In Klopfer v. North Carolina, 386 U.S. 213 (1967), however, the Supreme Court held that discharging an accused from custody does not necessarily terminate his right to a speedy trial. The *Klopfer* case involved a North Carolina procedural device that allowed a prosecutor to take a *nolle prosequi* on an indictment, thereby discharging the accused from custody and tolling the statute of limitations. *Id.* at 214. Under the *nolle prosequi* procedure, the prosecutor could reinstate the indictment at any subsequent term of court. The Court ruled that this procedure denied the defendant his right to a speedy trial because it indefinitely prolonged the indictment without any stated justification. *Id.* at 222. In so holding, the Court emphasized that the pendency of the indictment would likely cause the defendant anxiety even after he had been discharged from custody. *Id.* Because the indictment in *Klopfer* was never actually dismissed, the Court did not decide whether the time between successive prosecutions must be considered for speedy trial purposes. For commentary on *Klopfer*, see Note, *Criminal Law—The Right to a Speedy Trial is a Fundamental Right Guaranteed by the Sixth Amendment*, 10 S. TEX. L.J. 168 (1968); 18 MERCER L. REV. 497 (1967).

32. *Compare* United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978); United States v. Martin, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (all holding speedy trial clause inapplicable to time period between dismissal of charges and reindictment) *with* Jones v. Morris, 590 F.2d 684 (7th Cir.), *cert. denied*, 440 U.S. 965 (1979); United States v. Merrick, 464 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972) (both holding that delay between dismissal and reindictment must be included for speedy trial purposes).

33. Many state courts hold this view. *See, e.g.*, State v. Avriett, 25 Ariz. App. 63, 540 P.2d 1282 (1975) (speedy trial time period begins anew when original indictment dismissed); State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963) (one-year period between dismissal and reindictment ignored in determining whether defendant's speedy trial right violated); State v. Fink, 217 Kan. 671, 538 P.2d 1390 (1975) (time elapsed during entire period of first indictment irrelevant for speedy trial purposes); State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967) (three-year delay between dismissal and reindictment on same charge not included in computing speedy trial time).

34. 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977).

35. *Id.* at 579.

Marion rule that the right to a speedy trial does not attach until arrest or formal charging[36] and reasoned that because the defendant was not charged with a crime during the period between dismissal and reindictment, he was not denied the right to a speedy trial.[37]

In *United States v. Bishton*[38] the District of Columbia Circuit likewise held that a delay between dismissal and reindictment may not be considered in determining speedy trial violations.[39] The D.C. Circuit cited the *Marion* rule and emphasized that after dismissal and before reindictment the defendant was a free man against whom no prosecution was pending.[40] The Ninth Circuit adopted the same rule in *Arnold v. McCarthy*[41] and held that after the original charges had been dismissed the defendant was no longer accused, so that under *Marion* he had no right to a speedy trial until reindictment.[42]

In *United States v. Hillegas*[43] the Second Circuit held the speedy trial clause inapplicable to a three-year period between dismissal and reindictment because after dismissal of charges the defendant was free from any arrest restraints.[44] According to the court, the defendant was not subject to disruption of employment, public ridicule, or more stress than any other person who might be under police investigation and not charged with a crime.[45] Furthermore, the Second Circuit found that neither the defendant nor the public in general had any interest in promptly processing a "nonexistent case."[46]

Several circuits, however, have held that the suspension period must be considered when evaluating a claim that the speedy trial clause has been violated, because the speedy trial right does not terminate at dismissal and reattach at reindictment.[47] In addition to the Fourth Circuit's decisions in *MacDonald I* and *II*,[48] the Seventh and Tenth Circuits have adopted this

---

36. *See supra* text accompanying notes 17-20.

37. 543 F.2d at 579.

38. 463 F.2d 887 (D.C. Cir. 1972).

39. *Id.* at 889-90.

40. *Id.* at 891. The court found that when a person has not been arrested or indicted, he " 'suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer.' " *Id.* (quoting United States v. Marion, 404 U.S. 307, 321 (1971)).

41. 566 F.2d 1377 (9th Cir. 1978).

42. *Id.* at 1383. The Ninth Circuit has since limited its holding in *Arnold* to cases in which the original indictment was dismissed as a result of a mistrial. The court left open the question whether the postdismissal period will be considered for speedy trial purposes when dismissal does not follow a mistrial. United States v. Henry, 615 F.2d 1223, 1233 n.13 (9th Cir. 1980).

43. 578 F.2d 453 (2d Cir. 1978).

44. *Id.* at 458.

45. *Id.*

46. *Id.*

47. A number of state courts have also adopted this position. *See, e.g.*, Florida *ex rel.* Barber v. Satin, 296 So. 2d 636 (Fla. Dist. Ct. App. 1974) (357-day delay between dismissal and reindictment considered in determining that defendant's speedy trial right had been violated); Johnson v. State, 252 Ind. 79, 246 N.E.2d 181 (1969) (one-year period between *nolle prosequi* dismissal and reindictment included for speedy trial purposes).

48. *See supra* notes 8-9 and accompanying text.

view. In *Jones v. Morris*[49] the Seventh Circuit assumed, without discussing its reasoning, that a six-month delay between dismissal and reindictment must be counted for purposes of the speedy trial analysis.[50] The Tenth Circuit reached the same conclusion in *United States v. Merrick*,[51] another case involving a six-month period during which charges were suspended. The Tenth Circuit simply included the six-month period in computing trial delay without offering any explanation of its reason for doing so.[52]

The Fifth and D.C. Circuits have considered the problem of determining the time to be counted for speedy trial purposes when the government intentionally dismisses an indictment and reinstitutes charges in order to gain a tactical advantage over the defendant.[53] These courts have reasoned that when the government implements such delaying strategy, the time after dismissal and before reindictment must be considered in determining whether the sixth amendment has been violated.[54]

Although the D.C. Circuit had held in *United States v. Bishton* that the postdismissal period was irrelevant for speedy trial purposes,[55] the same court held otherwise when the government dismissed an indictment in one forum in order to reindict the defendant in a more favorable jurisdiction. In *United States v. Lara*[56] prosecutors dismissed indictments against the defendants in the District of Columbia and, because Florida was a more favorable jurisdiction for the government's case, reindicted the defendants in the Fifth Circuit. In finding the time of delay to be the period from the original indictment in the District of Columbia until the Florida trial, the court emphasized that it could not tolerate long and unnecessary delay caused by the government's attempt to seek a procedural advantage.[57]

The Fifth Circuit held in *United States v. Davis*[58] that the speedy trial analysis must be applied from the date of the second indictment against a defendant.[59] In that case, however, tactical delay by the prosecution was not shown. In contrast, *United States v. Avalos*[60] presented the Fifth Circuit with the problem of government "court shopping." In *Avalos* prosecutors dismissed narcotics charges against the defendants in order to reindict them in a more favorable Florida court. The Fifth Circuit condemned this tactical delay by the government and measured the pretrial delay from the

49. 590 F.2d 684 (7th Cir.), *cert. denied*, 440 U.S. 965 (1979).

50. 590 F.2d at 686.

51. 464 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).

52. 464 F.2d at 1090.

53. *See, e.g.*, United States v. Avalos, 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975); United States v. McKim, 509 F.2d 769 (5th Cir. 1975).

54. For commentary supporting this argument, see *Misapplication of the Constitutional Rights to a Speedy Trial, Fourth Circuit Review*, 38 WASH. & LEE L. REV. 563, 587 (1981).

55. *See supra* text accompanying notes 38-40.

56. 520 F.2d 460 (D.C. Cir. 1975).

57. *Id.* at 464.

58. 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).

59. 487 F.2d at 116.

60. 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1979).

time of the original indictment.[61] The court held that failure to measure the speedy trial period from the defendant's initial arrest would permit the government to circumvent the speedy trial requirement by dismissing and reinstituting a complaint and indictment for the same offense.[62]

II. *UNITED STATES V. MACDONALD*

In *United States v. MacDonald* the Supreme Court confronted the question of the time period to be considered in the speedy trial analysis when criminal charges against a defendant are dropped and later reinstituted. The Court ruled that the time between the dismissal of charges and reindictment on the same charges may not be considered when evaluating a claim that the sixth amendment speedy trial clause has been violated.[63] Writing for the majority, Chief Justice Burger[64] first reaffirmed the Court's holdings in both *Marion* and *Dillingham* that the right to a speedy trial does not attach until a defendant is indicted, arrested, or officially accused.[65] As in *Marion*, the majority emphasized that the primary purpose of the speedy trial clause is to "minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."[66] The Court thus made clear that the speedy trial guarantee was not intended to prevent prejudice to the defense caused by the passage of time, because that interest is protected by the fifth amendment due process clause and statutes of limitation.[67]

The Court then held that because the speedy trial clause was designed to protect only against lengthy pretrial incarceration and anxiety caused by accusation, the right to a speedy trial is no longer applicable once the government, in good faith, drops charges against a defendant.[68] The majority

61. 541 F.2d at 1108 n.13.

62. *Id.*

63. 102 S. Ct. 1497, 1501, 71 L. Ed. 2d 696, 703 (1982).

64. Justices White, Powell, Rehnquist, and O'Connor joined Chief Justice Burger in the majority opinion.

65. 102 S. Ct. at 1501, 71 L. Ed. 2d at 702-03. For a discussion of the Court's treatment of speedy trial measurement in *Marion* and *Dillingham*, see *supra* text accompanying notes 15-29.

66. 102 S. Ct. at 1502, 71 L. Ed. 2d at 704.

67. *Id.* The defendant argued that even if his right to a speedy trial did not attach until the time of civilian indictment, the lengthy preindictment delay resulted in actual prejudice at trial and violated fundamental conceptions of justice. The defendant claimed, therefore, that under United States v. Lovasco, 431 U.S. 783 (1977), his due process right had been violated. Brief for Respondent at 31. The Supreme Court, however, refused to rule on the due process issue and remanded the issue to the court of appeals for resolution. 102 S. Ct. at 1500 n.5, 71 L. Ed. 2d at 702 n.5. For a discussion of *Lovasco*, see *supra* note 25.

68. 102 S. Ct. at 1501, 71 L. Ed. 2d at 703. The Court noted that its holding is in agreement with the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976 & Supp. V 1981). 102 S. Ct. at 1501 n.7, 71 L. Ed. 2d at 703 n.7. Section 3161(h)(6) provides that if the government initially dismisses charges against a defendant and later reindicts him on the same charges, the time between dismissal and redindictment must be ignored for speedy trial purposes. 18 U.S.C. § 3161(h)(6) (1976). For commentary on the Speedy Trial Act of 1974, see Black, *The Speedy Trial Act—Justice on the Assembly Line*, 8 ST. MARY'S L.J. 225 (1976);

noted that once charges are dismissed, personal liberty is impaired to a lesser degree than while a defendant is accused of a crime.[69] The majority stated further that when charges are no longer pending against a defendant, he is at worst placed in the same position as a person who is subject to a criminal investigation and not yet accused.[70] The Court thus emphasized that once charges have been dismissed, any restraint on liberty, strain on financial resources, disruption of employment, and exposure to public ridicule, stress, and anxiety are no greater than that experienced by any person who is subject to a criminal investigation.[71]

Turning to the specific situation in *MacDonald*, the Court noted that once the Army dropped the military charges against the defendant, there was no criminal prosecution upon which he could have been tried until the 1975 civilian indictment.[72] The Court further noted that during the intervening period, MacDonald was not under arrest, in custody, or subject to any criminal prosecution, but was free to continue his life.[73] The Court held that during the time between the dismissal of military charges and the indictment on civilian charges, MacDonald was legally and constitutionally in the same position as if no charges had been brought, and therefore, this period could not be counted for speedy trial purposes.[74] According to the Court, the only time that could be counted, the period between civilian indictment and trial, was not sufficiently lengthy to constitute a speedy trial violation.[75]

Justice Marshall, joined by Justices Brennan and Blackmun, dissented vigorously, arguing that "nothing in the language [of the sixth amendment] suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial right."[76] Justice Marshall claimed that even after termination of an initial prosecution, the anxiety suffered by the accused is sufficiently harsh to require speedy trial protection.[77] Such anxiety is more serious than that of a person merely under investigation, argued Justice Marshall, because the government has already demonstrated the seriousness of its prosecutorial threat by initially bringing

---

Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976); Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 BROOKLYN L. REV. 757 (1978).

69. 102 S. Ct. at 1502, 71 L. Ed. 2d at 704.

70. *Id.*

71. The Court noted that although the knowledge of an ongoing criminal investigation would certainly cause stress and discomfort, and possibly disrupt one's lifestyle, these results would be true whether or not charges had been filed and then dismissed. *Id.*

72. *Id.* at 1503, 71 L. Ed. 2d at 705.

73. *Id.*

74. *Id.*

75. *Id.* The Court emphasized that MacDonald had conceded that the delay between his second indictment and trial resulted primarily from his own delay tactics. *Id.*

76. *Id.* at 1505, 71 L. Ed. 2d at 708.

77. *Id.* at 1506, 71 L. Ed. 2d at 709. Justice Marshall argued that Klopfer v. North Carolina, 386 U.S. 213 (1967), indicated that the anxiety suffered by a defendant, even after termination of the proceedings and his release from custody, requires application of the speedy trial protection. 102 S. Ct. at 1506, 71 L. Ed. 2d at 709. For a discussion of *Klopfer*, see *supra* note 31.

charges.[78] The dissent also claimed that the majority's holding, by allowing the government to dismiss charges against a defendant and reindict him on the same charge, will encourage unjustifiable delays in bringing defendants to trial.[79]

Having decided that the time period between dismissal and reindictment must be included for sixth amendment purposes, Justice Marshall then considered whether MacDonald's speedy trial right had been violated by the delay between military arrest and civilian trial.[80] In so doing, Justice Marshall relied on the four-factor test developed by the Court in *Barker v. Wingo*.[81] Although he called the question a close one, Justice Marshall found that MacDonald's right had been violated under the *Barker* analysis, because (1) the length of the delay was excessive; (2) the government was unable to justify the delay; (3) MacDonald had repeatedly asserted his right to a speedy trial; and (4) the delay likely resulted in prejudice to MacDonald at trial.[82]

Justice Stevens concurred with the majority opinion, although he agreed with the dissent's argument that the speedy trial right is not suspended between dismissal and reindictment.[83] Justice Stevens joined the majority because he believed the government's interest in proceeding cautiously and deliberately before making a final decision to prosecute for serious offenses to be of "decisive importance."[84]

The *MacDonald* opinion represents the Supreme Court's first attempt to resolve the conflict among the circuits regarding the measurement of speedy trial time after dismissal of charges and before reindictment on the same charges. The Court, however, limited its holding to cases in which the government dismisses the original charges in good faith.[85] By stressing that "this is not a case where the government dismissed and later reinstituted charges to evade a speedy trial guarantee,"[86] the Court indicated that it might be willing to consider the time between dismissal and reindictment for speedy trial purposes when the government has reinstated charges against a defendant simply to gain a tactical advantage. As the dissent observed, however, such a result would be inconsistent with the *MacDonald* ruling that the speedy trial right is irrelevant to time periods when the defendant is not accused.[87]

---

78. 102 S. Ct. at 1507, 71 L. Ed. 2d at 710.
79. *Id.* at 1508, 71 L. Ed. 2d at 712.
80. *Id.*
81. *Id.* at 1509, 71 L. Ed. 2d at 712 (citing Barker v. Wingo, 407 U.S. 514 (1972)). For a discussion of *Barker*, see *supra* note 12.
82. 102 S. Ct. at 1509-10, 71 L. Ed. 2d at 712-14.
83. *Id.* at 1503, 71 L. Ed. 2d at 705-06.
84. *Id.*
85. The Court stated that "the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." *Id.* at 1501, 71 L. Ed. 2d at 703.
86. *Id.* at 1503 n.12, 71 L. Ed. 2d at 705 n.12.
87. Justice Marshall's dissent stated:

> The majority's statement that the delay in this case was not in bad faith . . . is puzzling. Under the majority's constricted view of the Sixth Amendment, the good or bad faith of the government in the period between successive prosecu-

The Court's opinion in *MacDonald* is, therefore, somewhat confusing. The primary significance of *MacDonald* is that it precludes courts from counting the time between dismissal and reindictment for sixth amendment purposes absent a showing of government bad faith in reinstituting charges. The question remains unanswered, however, whether the Court will allow the time between successive prosecutions to be considered in evaluating a speedy trial claim when the government dismisses and reinstates charges merely for strategic purposes.

III. CONCLUSION

In *United States v. MacDonald* the Supreme Court held that the time between the dismissal of criminal charges and subsequent reindictment on the same charges may not be considered in determining whether a defendant's right to a speedy trial has been violated. The Court first reaffirmed its position in *United States v. Marion* that the speedy trial right attaches only upon formal charging or indictment and is designed primarily to protect against lengthy pretrial incarceration and anxiety resulting from public accusation. The Court then narrowed its *Marion* holding by reasoning that once prosecutors dismiss charges against a defendant, he suffers no greater anxiety or restraint on personal liberty than an individual who is merely under investigation and not yet accused. The Court, therefore, concluded that once an indictment is dismissed, the individual is placed in the same position as a person whose speedy trial right has not yet attached. In *MacDonald*, by emphasizing that the government did not dismiss and reinstitute charges in order to gain a strategic advantage, the Court left open the possibility that the time between successive prosecutions may be considered for speedy trial purposes if the government engages in bad faith tactics.

Paul R. Clevenger

---

tions is entirely irrelevant to whether the defendant's speedy trial right has been violated, since the defendant is not continually under formal accusation during that period.

Id. at 1508 n.6, 71 L. Ed. 2d at 712 n.6.